

I am not at all prepared to say, that if the plaintiff, upon the cross-examination, had asked the witness to state the date and contents of the bond, and the witness had done so, it would be competent to the plaintiff to except to the admissibility of the evidence. Under such circumstances, I should have been very much inclined to think, that the question would have been governed by the decision of the Court of Appeals in *Boteler and Belt vs. Beall*, 7 G. & J., 897, 398, where hearsay evidence, not otherwise admissible, was made so by being brought out on the cross-examination of the party, who interposed the exception at the hearing. But the question put upon the cross-examination in this case, after referring to the previous statement of the witness upon the examination in chief, that he, the witness, had given a bond of conveyance to his son, asks when he gave it, and if the witness knows in whose possession it is at this time. And in reply to this question, he says, "he does not know, the bond will speak for itself. Judge Heath was Samuel Worthington's counsel, and the bond was, and he supposes now is, in his possession." The inquiry, then, as to the date of the bond is not answered. So far from it, the witness says he does not know when he gave it, and refers to the bond itself for the information sought for by the question, and in addition states who had and he supposes still has the custody of it. The case, therefore, differs widely from that of *Boteler and Belt vs. Beall*, in which the witness answered the question put to him upon the cross-examination, and having answered it, and the information not proving acceptable to the party who called for it, the Court decided it did not lie in his mouth to object to its admissibility. But in this case, the witness expressly says, he is unable to give the information called for by the interrogatory, and points to the source whence it may be obtained, and this source being within reach of the adverse party, no presumption favorable to him can be drawn for the non-production of the paper.

I am, therefore, of opinion, that the exception of the complainants, to the parol proof of the gift, or promise to give, of 1817, and of the date or contents of the bond of conveyance